No. 15,695

United States Court of Appeals

For the Ninth Circuit

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, a Corporation,
Appellant,

vs.

HOMER CUNNINGHAM, JESS GULLETT and PERCY LAUDINGHAM,
Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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I.

STATEMENT OF THE CASE.

This appeal is from the order and judgment of the District Court whereby the said court dismissed the action as to the appellees.

The action was dismissed upon the District Court's finding that the applicable statute of limitations had run before appellant commenced this action (T.R. p. 14).

Appellant insurance company's complaint, which was filed in the District Court on August 23, 1956, re-

cited the following facts: That on March 9, 1951, appellees were employed by the Ben Mast Lumber Co.; that on said date appellees, while acting within the course and scope of their said employment, negligently and carelessly used and loaded a truck whereby one Rasmussen was killed; that on said date appellant insurance company insured Ben Mast Lumber Co. for such liability; that on March 8, 1952, the heirs of Rasmussen filed suit against Ben Mast Lumber Co. and its employees; that on June 29, 1955, judgment was entered in favor of the heirs of Rasmussen and against the Ben Mast Lumber Co. in the sum of $75,000, with costs, which said judgment was paid by appellant on behalf of Ben Mast Lumber Co. on August 17, 1956 (T.R. pp. 3-6).

Although appellant's complaint does not so state, appellant apparently seeks to maintain the action as the subrogee of Ben Mast Lumber Co., asserting Ben Mast's alleged cause of action against its own employees for damages allegedly suffered by Ben Mast because of appellees' alleged negligence occurring March 9, 1951.

II.

THE ISSUES.

The issues to be determined upon this appeal are:

1. What statute of limitations properly applies to the alleged cause of action of appellant against appellees.

2. When does such period of limitations commence running?

III.

ARGUMENT.

It is apparently agreed that the law applicable to this cause is the law of the State of California (Appellant's Opening Brief, pp. 9-16).

Appellant's apparent contention is that the cause of action asserted by it is one for breach of an implied contract of indemnity; that such a cause of action is controlled by Section 339 of the California Code of Civil Procedure, and that the two-year period of limitations did not commence to run until it had paid the judgment on August 17, 1956. The Code sections in question provide as follows:

> Section 340. Within one year: * * *
>
> 3. An action for libel, slander, assault, battery, false imprisonment, seduction of a person below the age of legal consent, or for injury to or for the death of one caused by the wrongful act or neglect of another, or by a depositor against a bank for the payment of a forged or raised check, or a check that bears a forged or unauthorized endorsement, or against any person who boards or feeds an animal or fowl or who engages in the practice of veterinary medicine as defined in Business and Professions Code Section 4826, for such person's neglect resulting in injury or death to an animal or fowl in the course of boarding or feeding such animal or fowl or in the course of the

practice of veterinary medicine on such animal or fowl.

Section 339. Within two years:

1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of section three hundred thirty-seven of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

It is the position of appellees that the applicable statute of limitations is the one year statute provided by Section 340 (3) of the California Code of Civil Procedure as found by the District Court.

(a) Whether Appellant's Alleged Cause of Action Is Based Upon Contract or Tort Is Not Determinative of the Proper Period of Limitations.

Appellant has devoted practically its entire brief to a discussion of two propositions, which are:

(1) that the master (Ben Mast Lumber Co.) does under proper circumstances have a cause of action against its employee-servants (appellees herein) arising out of the latter's alleged negligence whereby the master was damaged; and (2) that the cause of action is one in contract for the breach of an implied contract of indemnity existing between the master and its servants. Neither of these propositions is determinative of the issues herein and appellant has not cited a single authority from the State of California (or otherwise) in support of its contention that the statute of limitations applicable to its alleged cause of action against appellees is the two-year statute provided by California Code of Civil Procedure Section 339.

It is now, and has for many years been well settled by the law of the State of California that where misconduct or negligence constitutes a cause of action (or is the substantial "gravamen" of the cause of action) the selection of the applicable statute of limitations is entirely dependent upon the precise language of the various statutes of limitations provided by the California Code of Civil Procedure (Sections 335-349-3/4). And whether the misconduct or negligence complained of constitutes a breach of contract or of some positive duty (tort duties) is totally immaterial.

For example, it is well settled in the State of California that the cause of action for breach of warranty is controlled by *either* the one- (§ 340) or two- (§ 339) year period of limitations *depending* upon whether the misconduct or negligence results in personal injuries or death to another or some other type of injury or damage not involving personal injuries.

In the case of *Rubino v. Utah Canning Co.,* 123 C. A. 2d 18, 266 P. 2d 163, (1954) plaintiffs sued for personal injuries resulting from the eating of unwholesome canned peas manufactured and sold by defendants. The action was admittedly based upon an implied warranty of fitness which the court declared to be a contract, saying, at page 21:

> "An implied warranty, one imposed by law, is obviously ' . . . a contract, obligation or liability not founded upon an instrument of writing . . . ' Were we to go no further it would seem apparent then that subdivision 1, section 339, Code of Civil Procedure, would govern and that any action predicated upon a *liability* for violation of an implied warranty must be brought within the two year limitation."

The court went on to hold, after a lengthy discussion, that the one year statute applied, saying, at page 26:

> "It seems apparent that the legislative intent behind subdivision 3, Section 340, Code of Civil Procedure, was not to restrict its coverage to tort actions independent of any contractual relation, but to provide a limitation of one year where personal injury or death results, regardless of the

tort, contract, or breach of express or implied warranty aspect of the case."

That the two-year statute may also apply to a cause of action based on negligence or misconduct where the duty is created by contract but the negligence does not result in personal injuries is made clear by the case of *Lattin v. Gillette,* 95 Cal. 317, 30 P. 545 (1892). In this case the Supreme Court of California held that the liability of an abstractor of titles to one damaged by negligence of the abstractor in reporting the title clear of defects, although based on negligence, was nevertheless controlled by the two year statute under Section 339, Code of Civil Procedure. (See also *Wood v. Currey,* 57 Cal. 208 (1881)). From the foregoing it is clear that whether or not appellants' alleged cause of action is thought to be based on contract or tort can not be determinative of the proper statutory period of limitations to be applied thereto. That issue must be resolved by the language of the various statutes of limitation in question and the case law relating thereto.

(b) The District Court Properly Applied the One Year Statute Provided for by California Code of Civil Procedure 340 (3).

Although appellant's position is not entirely clear, it apparently contends that the one year statute of limitations applies only where the "injury" or "death" involved is the "injury" of the plaintiff, or a death for which plaintiff might maintain a wrongful death action under Section 337 of the California Code of Civil Procedure. (See Appellant's Opening Brief,

p. 7, last paragraph.) In other words appellant apparently contends that Section 340 (3) does not and can not apply where the injury or death is that of some person other than the plaintiff, and plaintiff's damage, by way of paying damages himself to the injured party or heirs of the decedent, arises solely by reason of plaintiff's *relationship* to the injured or deceased person. The case law of the State of California makes clear that whether plaintiff is himself the person "injured", or an heir of the decedent, or sustains damage only by reason of his *relation* to the injured party or decedent, does not alter the case and in each instance the cause is one controlled by the one year statute of limitations under Code of Civil Procedure § 340 (3). A number of different legal situations, all conclusively demonstrating the same point, can be considered.[1]

Perhaps the clearest and most directly analogous case is where an employer who has been required to pay workmen's compensation to his injured employee seeks to recover his damages thus sustained from the third party tort-feasor whose negligence proximately caused the injury or death of the employee. In such type case all of the substantial factual features bearing upon the employer's cause of action are identical to those existing in this case. In the supposed case the employer is himself free from negligence (which

[1]It should be noted that considerable research has failed to reveal any case before the California courts wherein the contention was made, as it is here made by appellant, that the two year statute (Code of Civil Procedure 339) would apply to the master's action against his servant.

is appellant's claim here), the employer is not himself personally injured or killed (which is the case here), and finally is damaged only by reason of being required to pay damages to the employee because of his *relational status* with regard to such employee, namely, the status of employer and employee. The case of *Aetna Casualty and Surety Company v. Pacific Gas and Electric Company,* 41 C. 2d 785, 264 P. 2d 5 (1953) involved that precise situation. In that case the Supreme Court of the State of California affirmed the trial court's order dismissing the action made on the grounds that the one-year statute of limitations applied and not the three-year statute applying to actions "upon a liability created by statute" (California Code of Civil Procedure § 381, subd. 1). Again, the court was constrained to point out that whether the *liability* was one in tort or one arising under a statute was not determinative of the applicable statutory period, saying at page 787:

> "Assuming without deciding, that this liability of the tort feasor to the employer or its insurance carrier for the employee's general damages is one created by statute (cf. *Limited Mutual Comp. Ins. Co. v. Billings,* 74 Cal. App. 2d 881, 884-885 [169 P. 2d 673], nevertheless under settled legal principles the trial court correctly concluded that the one-year statute applied."

The court went on to point out that whether the action was brought by the party who himself suffered personal injuries or by a party who, although himself innocent of negligence, was *damaged* by reason of hav-

ing to pay damages to the injured party because of their relational interest (viz., employer-employee), nevertheless the action was one squarely within the language of Section 340 (3), and therefore barred unless commenced within one year of the accident. In this regard the court said, at page 787, as follows:

> "The employee's general damage claim whether prosecuted by the employee personally or by his employer or its insurance carrier on his behalf, is solely one in tort for personal injuries arising out of the negligence of the third party tort feasor; hence the cause of action accrues at the time of the negligent act. No matter who may be the party plaintiff, the cause of action is one within the express terms of subdivision 3 of section 340 of the Code of Civil Procedure."

The case of *Basler v. Sacramento Ry. Co.,* 166 C. 33, 134 P. 993 (1913) illustrates a further situation wherein the court has found that whether the negligently caused personal injuries are directly suffered by the plaintiff or whether the plaintiff suffers damage only because of his relative rights does not affect the applicability of the one-year statute. In that case the husband of a woman who had suffered personal injuries while a passenger upon a trolley car of the defendant sued to recover for the loss of his wife's services and for medical expenses paid out by him. Plaintiff in that action made two separate contentions in support of his position that the two-year section (§ 339) rather than the one-year (§ 340 (3)) should apply to such cause of action. The first of these was

that the action was one for breach of the defendant's contract, as a common carrier, to safely transport the plaintiff's wife, and the second was that the cause of action, *as to him,* was not one for personal injuries, but for damages to "his relative rights." The court rejected the first contention, saying, at page 36,

> "In such actions where, as here, the breach of duty and the consequent injury to the passenger are set forth, such violation of its obligation by the common carrier is the *gravamen* of the action which arises *ex delicto* and not *ex contractu.*"

Of even more importance to the problem here presented was the court's rejection of the argument that the two-year period should apply because the action *as to the husband* was not one for personal injuries but for damages to the husband's "relative rights." In this connection the court said, at pages 36-37,

> "It has been held that the word 'for' means 'by reason of,' 'because of' and 'on account of' and that a statute prescribing a limitation on 'actions for injury to the person . . . caused by negligence' should be interpreted to mean 'actions' 'by reason of' or 'because of,' or 'on account of' injuries to the person caused by negligence.' (*Sharkey v. Skilton,* 83 Conn. 503 [77 Atl. 950].) Applying this rule to our own statute we must hold that the language of section 340 quoted above refers to actions for damages 'on account of' personal injuries. In *Sharkey v. Skilton,* the plaintiff was the husband of the injured woman and there, as here, counsel sought to make a distinction between the direct injury to the wife and the indirect damage and loss to the husband, but the

> court held that both harmful results had their efficient cause in the accident to her and that therefore the same statute of limitations applied to actions in which the wife was a party and to those in which the husband sued alone because of his relative rights."

The cited cases plainly demonstrate that the one-year statute is applied in California to every action where the conduct complained of is alleged to be negligence resulting in personal injuries or death.

The cited cases also demonstrate clearly that the rule is not affected by the fact that plaintiff was not directly or personally injured but damaged only through his relation to the injured party, nor by the fact that as between the person damaged in his relational interest and the negligent defendant the liability of the latter was based on either a contract or a statute.

(c) The Judgment of the District Court Was Proper Whether the One-Year or Two-Year Period Applied Because the Cause of Action Arose at the Time of the Negligence Complained of Which Was In Excess of Five Years and Five Months Before Suit Was Commenced.

Appellant argues, without citation of a single authority in support, that the cause of action upon which it sues did not arise at the time of the claimed negligent acts and resulting death, but only after the employer Ben Mast Lumber Co. had paid the judgment against it (Appellant's Opening Brief, pp. 13-14). The law of California, and some other jurisdictions as well, is directly to the contrary and it is

well settled in California that the cause of action based upon defendant's negligence or other tortious conduct arises immediately upon the act complained of despite the fact that such conduct might also constitute a breach of contract or statute.

In *Wood v. Currey,* 57 C. 208, plaintiff sued defendant for damages allegedly incurred by reason of the defendant's conduct in wrongfully causing a levy of execution against plaintiff's property, despite the fact that plaintiff had theretofore satisfied the judgment in question. Prior to instituting the action in question, plaintiff had successfully challenged the wrongful execution, by a separate proceeding in equity, and had received from the court an injunction perpetually restraining enforcement of the execution. The instant action was one to recover damages arising out of the wrongful execution and was not instituted until some two years and five months after the execution was originally levied but within one year from the affirmance by the Supreme Court of California of the injunction permanently enjoining enforcement of the execution. The court, having first determined that the two-year statute applied, went on to hold that the cause of action arose upon the date of the wrongful levy and was not postponed, as contended by the plaintiff therein, until all of the damages therefrom had accrued. The court said, at pages 209-210:

> " . . . When the defendant caused an execution to be issued upon the satisfied judgment, and to be levied upon the property of the plaintiff, he was guilty of a breach of duty which rendered

him amenable to the plaintiff for damages. This breach of duty constituted the gist of the action which the plaintiff brought against the defendant, and his right of action accrued at the time of the breach of duty, and not when the judgment in the injunction suit was rendered or affirmed by the appellate tribunal. And the Statute of Limitations commenced to run from the time of the alleged breach of duty. When misconduct or negligence constitutes a cause of action, the Statute of Limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence. (*Pillar v. S. P. R. Co.,* 52 Cal. 43; *Harpending v. Meyer,* 55 id. 555; *Howell v. Young,* 5 Barn. & C. 266.) The running of the statute in this case, therefore, commenced on the 4th of March, 1873—the day when the execution was wrongfully issued and levied—and it was not suspended by the injunction proceedings to restrain the enforcement of the execution.

"But it is contended, that the damages which plaintiff was entitled to recover did not accrue until the litigation resulting from the suit by injunction had been ended by the judgment of the Supreme Court. Damages which result from a tort do not constitute separate causes of action. They are parts of the tort itself, for which the cause of action is given; and the cause of action arises immediately on the happening of the injury, and is not postponed to the damages thereby occasioned. (Angell on Lim. §§ 298-300.)

"As the time prescribed by the statute had run before the plaintiff commenced his action, his cause of action was barred.

"Judgment affirmed."

The case of *Lattin v. Gillette,* 95 C. 317, 30 P. 545 (1892) is to the same effect and again demonstrates that whether the cause of action is thought to be in tort or contract does not alter the fact that the cause arises immediately upon the happening of the alleged negligent conduct. In that case the defendant, an abstractor of titles, was employed by plaintiff to examine and report upon a title to certain real property. On June 12, 1886, defendant gave to plaintiff a certificate showing a good title in the seller from whom plaintiff thereupon purchased the property in question. Thereafter, and within two years of the commencement of the cited action, plaintiff was put to the cost and expense of defending a legal action attacking his title and did in addition suffer a judgment against him which deprived him of one-half of the land. His action to recover such damages from defendant was commenced in May of 1890. The question to be decided was whether the two-year period provided by Code of Civil Procedure commenced to run upon the date that defendant delivered to plaintiff the faulty abstract of title or only after the judgment which established his damages, was made. The court, in rendering its judgment dismissing the action, upon the grounds that the cause of action arose immediately upon the delivery to plaintiff of the faulty abstract, said, at pages 319-320:

> "The statute of limitations begins to run against a cause of action as soon as the right of action has accrued. Upon the breach of any special contract, the statute begins to run at the date of the breach, and a right of action growing out of the negligence

of another accrues whenever the act of negligence is complete. 'When misconduct or negligence constitutes a cause of action, the statute of limitations begins to run from the time when the defendant had been guilty of such misconduct or negligence.' (*Wood v. Currey,* 57 Cal. 209.) Whether the negligence out of which the cause of action arises is the breach of an implied contract, or the affirmative disregard of some positive duty, is immaterial. In either case, the liability arises immediately upon such breach of contract or disregard of duty, and an action to recover the damages which are the measure of such liability may be immediately maintained. The right to maintain the action is distinguished from the measure of damages, and although the entire damage resulting from such negligence may not have been sustained, or the fact that the negligence occurred may not have been known until the right to a recovery is barred, yet the time within which an action may be brought is not thereby prolonged."

* * *

"The running of the statute was not suspended by the fact that the plaintiff did not ascertain the error in the certificate, or by the fact that the existence of the error was not determined by the superior court until more than two years had expired. The judgment of the court did not constitute the negligence of the defendants, but was only evidence that they had been guilty of negligence; and the eviction of the plaintiff under such judgment was not the cause of action against the defendants, but was merely an element in determining the amount of damages that he had sustained by reason of their negligence."

That the cause of action there involved was upon the implied contract of the defendant to use skill and care in his employment (the same contention which appellant makes in the instant cause), is made clear by the court's discussion at page 323, where it said:

> "As in the case of an erroneous deed drawn by an attorney, or a defective plat made by a surveyor, or a wrong prescription given by a physician, it (the certificate of title) is only evidence in support of the averment that the implied contract for the exercise of skill and care was violated, and is not the contract itself. That was created by the oral agreement of employment, and was broken by the giving of the faulty writing."

The contention made by appellant that its cause of action could not have matured until all of its alleged damage had accrued by payment of the judgment is plainly erroneous, as the above cited decisions make clear. Nor does such possibility result in any necessary hardship to the holder of such an alleged cause of action for the law of California plainly permits the alleged indemnitee (assuming without admitting that appellant's complaint herein shows it to be an indemnitee) to commence his action against the alleged indemnitor immediately upon the filing of the suit by the injured party. The matter was squarely decided in the case of *Atherley v. MacDonald, Young and Nelson,* 135 C. A. 2d 383, 287 P. 2d 529 (1955), wherein the court stated, at pages 386-387:

> "If the main action were on contract the decided cases in this state would compel the holding that one defendant is entitled to file a cross-complaint

against a codefendant upon a contract to indemnify him against the liability sought to be enforced by the plaintiff. [6] The rule with the cases supporting it was thus stated in *Television Arts Prod. v. J. Fairbanks, Inc.,* 134 Cal. App. 2d 293, at p. 297 [285 P. 2d 695]: 'Where several persons are sued upon a demand, against which one defendant has agreed to indemnify another, the latter may have his rights to indemnify determined by means of a cross-complaint. It was so held in *Eastin v. Roberts, Carpenter & Co.,* 19 Cal. App. 2d 567 [66 P. 2d 224]; *County of Humboldt v. Kay,* 57 Cal. App. 2d 115 [134 P. 2d 501]; *Sattinger v. Newbauer,* 123 Cal. App. 2d 365 [266 P. 2d 586].'

"The fact that in our case the main action is in tort while in the cases cited above it was in contract does not in our opinion furnish any sound distinction between the cases. The 'transaction' clause of section 442 is at least as broad in its language as the 'transaction' clause of section 427, subdivision 8, Code of Civil Procedure, which permits the joinder in one action of '(c)laims arising out of the same transaction.' This has been construed to permit the joinder of an action in tort and an action against one who by contract has assumed a direct liability for such tort. (*Kane v. Mendenhall,* 5 Cal. 2d 749, 753 [56 P. 2d 498]; *Grier v. Ferrant,* 62 Cal. App. 2d 306, 313 [144 P. 2d 631].)"

Even though appellant were correct in its assertion that its cause of action would not arise until it had been damaged, it nevertheless is entirely obvious that its action would be barred by either the one-year or

two-year period of limitations in this case. The complaint herein alleges that the suit of the Rasmussen heirs was commenced on March 8, 1952 (T.R. p. 5), some four years and five months before the commencement of the instant action. Certainly the District Court was entitled to judicially notice that appellant was, therefore, immediately after March 8, 1952, *damaged* by payment of the necessary filing fees and other court costs attendant upon the filing of its answer to such action. In this connection it should also be noted that appellant seeks to recover herein just such legal *costs* and expenses in the sum of $1,013.62, as well as attorney's fees and the amount eventually paid in satisfaction of the judgment (T.R. p. 6). Certainly it must follow from the application of the argument made by appellant itself that the payment of such legal costs and expenses constituted *damages* which were then and there (in March 1952) recoverable from appellees. If appellant was therefore *damaged* in March 1952 by payment of such court costs and filing fees, its cause of action to recover the same then arose and whether the period of limitations was one year or two years is now barred. The fact that further damages may have thereafter accrued can not, as the cases above cited hold, serve to prevent or postpone the arising of the cause of action beyond the date upon which damage first accrued.

A situation which is identical in its substantial effects to that here presented, frequently occurs in the relationships between manufacturers, retailers, and consumers. The case of *New Amsterdam Casualty*

Co. v. Baker, 74 F. Supp. 809 (D. C., Maryland, 1947) is illustrative of such type cases and the opinion therein again indicates that appellant's position is unsound. In that case one Baker, on August 19, 1941, sold a quantity of chenille robes to a retailer, Lansburgh & Bros. Thereafter Lansburgh & Bros. on January 3, 1942, sold one of the robes to Doris Deffebach. On January 17, 1942, Deffebach received substantial personal injuries when the robe caught fire. Deffebach commenced an action for damages for breach of warranty against Lansburgh & Bros. That action was prosecuted through the courts until, in November, 1945, the United States Supreme Court denied Lansburgh & Bros.' petition for a writ of certiorari. Thereafter Lansburgh & Bros., through its insurance carrier, paid to Deffebach the sum of $13,000 in settlement of its liability. On December 12, 1946, the New Amsterdam Casualty Co., as subrogee of Lansburgh & Bros., commenced its action for breach of warranty against Baker to recover the damages sustained by it in settling the Deffebach claim. The defendant Baker moved for summary judgment on the grounds that the period of limitations had expired before commencement of the action. The court in granting defendant's motion for summary judgment, said at page 810:

> "The question in the case, therefore, becomes limited to the inquiry, whether the running of the period of limitations was postponed until the acknowledgment of liability by Lansburgh and the consequent determination of the amount of damages by the insured; or, in other words, when did the statute of limitations begin to run in this case."

The court, after careful consideration of the pertinent authorities, noted, in holding that the cause of action accrued when Lansburgh & Bros. purchased the robe in question or in any event when it learned of the claimed breach of warranty from Deffebach, said, at page 812:

> "Counsel for the plaintiff submits the general argument to the effect that limitation ordinarily does not begin to run until there is an existing cause of action. It is true, of course, in this case that the insurer had no cause of action until it paid the loss (within the three year period), but it is likewise clear that it is suing only as a subrogee of Lansburgh who did have a cause of action at least when the defect was first discovered which, however, was beyond the three-year period. It is plausibly argued that while Lansburgh theoretically may have had a cause of action when the defect was first discovered, it was not practicable for him to bring suit against Baker until the fact both of breach of warranty with respect to the nature of the goods and the amount of the damages therefor had been established. And therefore the realistic view is urged that in a case of this nature the beginning of limitations should be postponed until the ascertainment of the amount of damages. And in this connection it is further urged that, Baker, being informed of the pending litigation and offered an opportunity to assist in the defense, has not really been prejudiced by the delay in the suit. Or, in other words, that Lansburgh and its subrogee, the present plaintiff, had not been guilty of laches. But however plausible this argument may seem, I can find

> no established principle of the law of limitations to support it; and the case must be decided on the law as it is and not on what the court may think it should be."

The only possible distinction of substance between the relationship of the various parties in that action and the relationship of the parties herein is that here the alleged liability of appellees arises out of the negligence charged against them, whereas the foundation of liability in that action was the defendant's alleged breach of the contract of warranty. Such distinction can serve only to make the application of the rule even more abundantly clear in this case.

(d) The Master's Right of Action Against His Servant Is Based on Negligence and Principles of Tort Law.

Appellant has, in his opening brief, variously described the liability of the servant to his master for damages occasioned by the servant's negligence as being a liability for "indemnity" or "restitution" (T.R. p. 15). Appellant, however, apparently does not dispute that the supposed liability is founded upon the alleged *negligence* of the employees and indeed says:

> "The principle for which we contend—that an innocent employer has a cause of action for indemnity or restitution against his *negligent* employees . . ." (T.R. p. 10). (Emphasis added.)

That the alleged liability of the employee is in fact entirely based, and dependent, upon negligence is also made clear by the statutory law of the State of Cali-

fornia. Sections 2802 and 2865 of the Labor Code of the State of California define the nature and extent of the obligations arising out of the employer-employee relationship as they affect the employer and employee respectively. These sections provide as follows:

> "§2802. *Indemnification of employee for expenditures or losses in discharge of duties or obedience to directions.* An employer shall indemnify his employee for all that the employee necessarily expends or loses in direct consequence of the discharge of his duties as such, or of his obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful."
>
> "§ 2865. *Liability for culpable negligence: Liability of employer for services.* An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer. The employer is liable to the employee if the service is not gratuitous, for the value of the services only as are properly rendered."

It will be noted that although the Labor Code has imposed a duty of *indemnification* upon the *employer* it has provided as to the employee a liability which is strictly within the concept of tort law. Obviously the legislature having provided in the one instance for indemnity intended, by eliminating such right as against an employee, that as to such employee no right of indemnification should exist and that the employer's rights against the negligent employee are founded solely upon tort. Inasmuch as the complaint herein

does not seek to allege any special contract between appellant and appellees, other than that implied by law from the employer-employee relationship, the quoted provisions of the Labor Code are the entire measure of appellees' liability to appellant. These Labor Code sections, upon their face, establish that the only cause of action which appellant could have had was the common law cause of action for negligence. The California case authority previously cited establishes that such cause of action arose at the time of the negligent acts alleged and was barred at least four months before the present action was commenced.

CONCLUSION.

It is respectfully submitted that, whether the proper period of limitations to be applied to appellant's alleged cause of action is one year or two years, the action was barred before suit was commenced herein, and that the District Court's judgment of dismissal should be sustained.

Dated, San Francisco, California,
March 17, 1958.

Respectfully submitted,
J. D. BURDICK,
Attorney for Appellees.